

Mar 21, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

EFREN SUAREZ RANGEL,

Defendant.

No. 4:18-CR-6002-SMJ

**ORDER DISMISSING
INDICTMENT**

**U.S. MARSHALS ACTION
REQUIRED**

Before the Court is United States Attorney's Office (USAO)'s Motion for Pretrial Detention, ECF No. 41. The Court held a hearing on the motion on March 16, 2018. The Court denied the motion, dismissed the indictment, and ordered Mr. Rangel released. This order memorializes and supplements the Court's oral ruling.

Defendant Efren Suarez Rangel is a citizen of Mexico present in the United States illegally. Mr. Rangel was indicted on charges of two counts of distribution of 50 grams or more of actual methamphetamine in violation of 21 U.S.C. § 841(a)(1)(b)(1)(A)(viii) and (b)(1)(B)(viii). While in custody on these charges, Immigration and Customs Enforcement (ICE) placed a detainer on Mr. Rangel. Following a detention hearing, Magistrate Judge Dimke ordered Mr. Rangel released on bond subject to conditions imposed in her order of release pursuant to the Bail Reform Act (BRA), 18 U.S.C. § 1341 *et seq.* ICE took custody of Mr.

1 Rangel upon his release from Department of Justice (DOJ) custody and
2 transported him to Tacoma, where he was detained pending removal proceedings.

3 Although ICE elected to pursue immigration proceedings, the USAO did
4 not dismiss the criminal indictment. As a result, on March 1, 2018, the Court held
5 a pretrial conference in the criminal matter and Mr. Rangel failed to appear. Both
6 parties acknowledged Mr. Rangel’s absence was due to his detention in ICE
7 custody. The Court issued a warrant for Mr. Rangel’s arrest. When Mr. Rangel
8 appeared on the arrest warrant, the USAO once again moved for Mr. Rangel’s
9 pretrial detention, giving rise to the instant proceedings.

At the detention hearing, the USAO indicated that ICE intends to reassume custody of Mr. Rangel if he is once again released pending trial. Accordingly, in addition to reviewing Mr. Rangel's eligibility for pretrial release under the BRA, this matter also requires the Court to resolve the conflict between the USAO and ICE in the execution of their respective statutory mandates.

FACTS

16 On January 10, 2018, Mr. Rangel was indicted on two counts of distribution
17 of 50 grams or more of actual methamphetamine in violation of 21 U.S.C.
18 § 841(a)(1)(b)(1)(A)(viii) and (b)(1)(B)(viii). ECF No. 1. These offenses carry a
19 mandatory minimum of 10 and 5 years, respectively. Mr. Rangel made his initial
20 appearance pursuant to the arrest warrant and was arraigned. ECF No. 11. The

1 USAO filed a motion for Mr. Rangel's pretrial detention, citing to the rebuttable
2 presumption under 18 U.S.C. § 3142(e). ECF No. 8. A detention hearing was held
3 before Magistrate Judge Dimke on January 18, 2018.

4 Magistrate Judge Dimke denied the USAO's motion for detention and
5 released Mr. Rangel on a number of standard and special conditions of release.
6 ECF No. 23. Special condition six provided,

7 In the event that ICE takes physical custody of Defendant, Defendant could
8 be detained outside of the Eastern District of Washington. If Defendant is
9 taken into physical custody by ICE, Defendant should be made available in
the Eastern District of Washington for further proceedings herein until this
matter is resolved. *See* 18 C.F.R. § 215.3.

10 *Id.*

11 On January 18, 2018, the USAO advised immigration authorities of the
magistrate court's release conditions and provided a copy of the order the
12 following day.

13 On January 25, 2018, following a *Nebbia* hearing, Magistrate Judge Dimke
14 determined that Mr. Rangel had sufficiently established a source of funds for bail
15 and ordered his release. ECF No. 28. Mr. Rangel was released the following day
16 after posting the percentage bond and filing the AO 1992 form. ECF Nos. 29 &
17 31.

18 On January 29, 2018, ICE took custody of Mr. Rangel pursuant to an
immigration detainer following his release from DOJ custody. ICE transported
20 Mr. Rangel to the Northwest Detention Center in Tacoma, Washington.

1 Mr. Rangel appeared before the assigned Immigration Judge on February
2 23, 2018. Mr. Rangel's retained counsel requested a continuance of the
3 immigration hearing as well as the detention hearing. The Immigration Judge reset
4 the hearings for March 16, 2018, and Mr. Rangel was detained pending the new
5 hearing.

6 On February 20, 2018, Mr. Rangel's appointed counsel in this matter filed a
7 motion to continue trial and the pretrial conference. ECF No. 32. The motion
8 indicated that defense counsel had encountered difficulty meeting with Mr.
9 Rangel due to his detention in ICE custody. *Id.* The Court held a pretrial
10 conference on March 1, 2018. Mr. Rangel failed to appear for the pretrial
11 conference. Both parties acknowledged that Mr. Rangel's absence was due to his
12 detention in ICE custody. The Court directed issuance of a no bail arrest warrant
13 based on Mr. Rangel's failure to appear. ECF No. 38. The Court denied defense
14 counsel's motion to continue because Mr. Rangel had not executed a speedy trial
15 waiver.

16 Mr. Rangel was processed on the warrant on March 4, 2018, and transferred
17 back into the custody of the United States Marshals Service. The USAO filed a
18 renewed motion for detention, ECF No. 41, and Mr. Rangel made an initial
19 appearance on March 8, 2018, ECF No. 42. A detention hearing was scheduled for
20

1 March 9, 2018. ECF No. 43. On March 9, 2018, Mr. Rangel was ordered detained
2 pending a hearing on the motion for detention before this Court. ECF No. 47.

3 The Court ordered the parties to provide briefing on the issue of pretrial
4 detention, specifically requesting the parties to address “proposed remedies should
5 ICE once again fail to produce Mr. Rangel for matters in this Court.” ECF No. 48.
6 The Court ordered supplemental briefing on potential constitutional issues on
7 March 15, 2018. ECF No. 55.

8 **DISCUSSION**

9 **A. Mr. Rangel is entitled to pretrial release under the BRA.**

10 The magistrate court determined that Mr. Rangel was entitled to pretrial
11 release subject to conditions pursuant to the BRA. The USAO did not appeal this
12 decision. However, the matter of Mr. Rangel’s detention is once again open for
13 review following his appearance on the Court’s arrest warrant following the
14 pretrial conference. The USAO urges this Court to disregard the magistrate’s
15 previous order and grant its motion for pretrial detention. While the Court has
16 undertaken an independent review of Mr. Rangel’s eligibility for pretrial
17 detention, it ultimately reaches the same conclusion as Magistrate Judge Dimke:
18 Mr. Rangel is entitled to pretrial release because the USAO cannot meet its burden
19 to show that no condition or set of conditions can reasonably ensure his
20 appearance or the safety of the community.

1 The BRA dictates that a defendant is entitled to pretrial release unless a
2 judicial officer judge finds that “no condition or combination of conditions will
3 reasonably assure the appearance of the person as required and the safety of any
4 other person and the community.” 18 U.S.C. § 3142(e)(1). To determine whether
5 conditions of release could reasonably assure Defendant’s appearance in court and
6 the safety of the community, the Court considers four factors: (1) the nature and
7 circumstances of the offense; (2) the weight of the evidence against the defendant;
8 (3) the history and characteristics of the defendant; and (4) the nature and
9 seriousness of the danger the defendant would present to the community if
10 released. *Id.* § 3142(g). The weight to be accorded to each factor rests in the
11 Court’s discretion. *United States v. Gentry*, 455 F. Supp. 2d 1018, 1020 (D. Ariz.
12 2006). However, the Ninth Circuit has directed that the weight of the evidence is
13 the least important factor. *United States v. Motamedi*, 767 F.2d 1403, 1407 (9th
14 Cir. 1985).

15 The BRA provides for a rebuttable presumption of pretrial detention for
16 defendants accused of committing certain offenses. 18 U.S.C. § 3142(e). Because
17 Mr. Rangel was indicted for violations of the Controlled Substances Act with a
18 maximum sentence of greater than ten years, a rebuttable presumption of
19 detention without bail applies in this case. *Id.* § 3142(e). This presumption shifts a
20 burden of production to Mr. Rangel, but the burden of persuasion remains with the

1 USAO. *United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008). “The
2 presumption is not erased when a defendant proffers evidence to rebut it; rather
3 the presumption ‘remains in the case as an evidentiary finding militating against
4 release, to be weighed along with other evidence relevant to the factors listed in
5 § 3142(g).’” *Id.* (quoting *United States v. Rodriguez*, 950 F.2d 85, 88 (2d Cir.
6 1991)).

7 The first two § 3142(g) factors—the nature and seriousness of the charged
8 offenses and the weight of the evidence—weigh against Mr. Rangel’s pretrial
9 release. The alleged offenses concern multiple transactions involving relatively
10 significant amounts of methamphetamine. ECF No. 1. Although the least
11 important factor in the analysis, the weight of the evidence alleged in this case
12 appears to be fairly substantial. The USAO asserts that officers recovered roughly
13 six pounds of methamphetamine and approximately twenty-thousand dollars from
14 Mr. Rangel’s residence. ECF No. 50 at 9–10. The Court considers the
15 presumption implicated under § 3142(e) as a further indication of the seriousness
16 of the crimes alleged.

17 The next factor, Mr. Rangel’s personal history and characteristics, strongly
18 favors pretrial release. Mr. Rangel has presented evidence of his ties to the
19 community and demonstrated commitment to remaining in the area. Mr. Rangel
20 originally came to the United States illegally in 1994 and has not returned to

1 Mexico since. His parents, siblings, children, and wife all live in the Tri-Cities
2 area. Mr. Rangel maintained a full time job as a farm equipment operator for the
3 past seven years, and his employer submitted a letter in support of his release.
4 Based on Mr. Rangel's very strong ties to the area and the fact that he has made
5 no prior attempts to return to Mexico, the Court finds it is highly unlikely that he
6 will flee if released pretrial.

7 With respect to the last factor, the USAO has presented no evidence that
8 Mr. Rangel poses an ongoing threat to any individual or the community. There are
9 no allegations before the Court related to firearms, prior crimes of violence, or
10 threats to other individuals. It is also notable that Mr. Rangel has no prior criminal
11 record with the exception of an infraction over ten years ago for using a cell phone
12 while driving. In recognition of this, the pretrial services report indicates release
13 with standard and special conditions as a possibility for mitigating any remaining
14 concerns regarding continued appearance or ongoing criminal activity.

15 Having conducted an independent review of the factors outlined above, the
16 Court finds that the balance of the factors weighs in favor of Mr. Rangel's pretrial
17 release. Although the nature of the offense and the weight of the evidence favor
18 continued detention, Mr. Rangel's personal history and characteristics combined
19 with the relatively low threat he poses if released favor pretrial release. The BRA
20 makes clear that “[o]nly in rare cases should release be denied, and doubts

1 regarding the propriety of pretrial release are to be resolved in favor of the
2 defendant.” *United States v. Santos-Flores*, 794 F.3d 1088, 1090 (9th Cir. 2015);
3 *see also United States v. Chavez-Rivas*, 536 F. Supp. 2d 962, 965 (E.D. Wis.
4 2008) (observing that “the court must resolve all doubts regarding the propriety of
5 release in the defendant’s favor”). Accordingly, the Court finds that Mr. Rangel is
6 entitled to pretrial release under the BRA.

7 **B. Mr. Rangel’s detention in ICE custody violates his right to pretrial
8 release under the BRA.**

9 At the detention hearing, the USAO explained that, if Mr. Rangel is again
10 released pending trial, ICE intends to reassume custody of Mr. Rangel pending his
11 removal. This is consistent with ICE’s actions following Mr. Rangel’s initial
12 pretrial release. However, such pretrial detention violates Mr. Rangel’s rights
13 under the BRA, which requires the executive to elect removal in lieu of criminal
14 prosecution or defer removal until after trial and sentencing are complete.

15 If a defendant is entitled to pretrial release under the BRA, that defendant
16 may not be detained in immigration custody while the criminal case is pending.
17 As noted above, the BRA establishes a framework for the pretrial status of
18 defendants evidencing a strong preference for pretrial release. Section 3142(a)
19 provides judicial officers with four options for a defendant’s pretrial status:
20 release on recognizance, release on conditions, temporary detention to permit
deportation/removal, and detention. Section 3142(b) states that a defendant shall

1 be released on personal recognizance unless no condition or set of conditions can
2 reasonably assure the defendant's appearance or the safety of the community.
3 Section 3142(c) lists the conditions of release that may be imposed if the
4 defendant is not released under subsection (b) with the mandate that the court
5 should impose the least restrictions necessary.

6 Section 3142(d) makes the dichotomous nature of criminal and immigration
7 proceedings clear. Under this section, if a judicial officer determines that (a) the
8 defendant is not a citizen of the United States or lawfully admitted for permanent
9 residence, and (b) he may flee or pose a danger to any other person or the
10 community, then the judicial officer "shall order the detention of such person for a
11 period of not more than ten days." 18 U.S.C. § 3142(d). During this period of
12 detention, ICE may elect to take the defendant into immigration custody to pursue
13 immigration proceedings. *Id.* If, however, ICE "fails or declines to take such
14 person into custody during that period, such person shall be treated in accordance
15 with the other provisions of this section, notwithstanding the applicability of other
16 provisions of law governing release pending trial or deportation or exclusion
17 proceedings." *Id.*

18 The language in § 3142(d) thus makes clear that when a defendant is treated
19 "in accordance with the provisions of" the BRA, "other provisions of law
20 governing release pending trial or deportation or exclusion proceedings" do not

1 apply. In other words, if the BRA applies, statutes governing detention related to
2 immigration proceedings do not. The BRA applies whenever a defendant is
3 brought before a judicial officer for having committed an offense against the
4 United States. *See* 18 U.S.C. § 3141 (referencing 18 U.S.C. § 3041). The
5 contrapositive of this statement instructs that if the rules governing deportation or
6 immigration proceedings apply, the BRA does not. The upshot of this is simple:
7 the BRA requires the Executive Branch to decide between pursuing a criminal
8 prosecution or immigration proceedings. The Executive cannot pursue both at the
9 same time.

10 Section 3142(d)'s title reaffirms this interpretation. *See Almendarez-Torres*
11 *v. United States*, 523 U.S. 224, 234 (1998) (“We also note that the title of a statute
12 and the heading of a section are tools available for the resolution of a doubt about
13 the meaning of a statute.”). Congress titled the section “Temporary Detention to
14 Permit Revocation of Conditional Release, Deportation, or Exclusion.” If ICE
15 elects to take custody of a defendant during the ten-day temporary detention
16 period authorized under the statute, it must be for the purpose of “deportation or
17 exclusion.” ICE may not take custody of a criminal defendant for the purpose of
18 detaining the defendant pending trial.

19 Several other courts to consider the issue have similarly concluded that
20 administrative pretrial detention in immigration custody violates a criminal

1 defendant's right to pretrial release under the BRA. *See United States v. Resendiz-*
2 *Guevara*, 145 F. Supp. 3d 1128, 1133 (M.D. Fla. 2015) (holding pretrial
3 deportation proceedings violated, among other things, defendant's rights under the
4 BRA); *United States v. Blas*, No. 13-0178-W-C, 2013 WL 5317228 at *6 (S.D.
5 Ala. Sept. 20, 2013) ("[N]othing permits ICE (or any other part of the Executive
6 Branch) to disregard the congressionally-mandated provisions of the BRA by
7 keeping a person in detention for the purpose of delivering him to trial . . . when
8 the BRA itself does not authorize such pretrial detention."); *United States v.*
9 *Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1179 (D. Or. 2012) (holding that, where a
10 magistrate judge determined a noncitizen criminal defendant did not pose a flight
11 risk or a danger to the community, "there is no statutory basis under the BRA for
12 him to be further detained by ICE").

13 In each of the above-cited cases, the defendants were charged with illegal
14 reentry in violation of 8 U.S.C. § 1326. The USAO argues that this distinction is
15 significant because the criminal charge for illegal reentry and administrative
16 consequence of removal are two paths to remedy the same conduct. However, the
17 criminal conduct charged does not impact the statutory analysis under the BRA.
18 Instead, each decision cited above turned on the fact that the BRA prohibits ICE
19 from detaining a criminal defendant for any purpose other than deportation or
20 removal. Thus, in each of the above-cited cases, the outcome was driven by the

1 courts' assessment that the executive must elect whether to pursue immigration
2 proceedings or criminal prosecution.

3 The conclusion that the BRA requires the executive branch to defer removal
4 proceedings when DOJ elects to pursue criminal prosecution is also supported by
5 other regulations authorized under the Immigration and Nationality Act, 8 U.S.C.
6 § 1101, *et seq.* Deportation control orders provide perhaps the most persuasive
7 example. A deportation control order provides a mechanism by which prosecutors
8 may prevent a noncitizen from leaving the country. The regulations state that
9 deportation of a noncitizen who is a party to a criminal case pending in a United
10 States court shall be “deemed prejudicial to the interests of the United States.” 8
11 C.F.R. § 215(3)(g). The regulations further instruct ICE not to remove such a
12 defendant without the prosecuting official’s consent. *Id.* These regulations
13 indicate the Executive Branch’s determination that criminal proceedings take
14 priority over deportation or removal. *See Trujillo-Alvarez*, 900 F. Supp. 2d at 1178
15 (noting the same).

16 Finally, this reading of the BRA promotes judicial economy and the
17 primacy of a defendant’s constitutional rights when facing trial. As this case aptly
18 demonstrates, permitting the executive to proceed concurrently with a criminal
19 prosecution and removal proceedings would result in a substantial waste of
20 government resources. In this case, both ICE and the United States Marshals

1 Service have expended significant resources transporting Mr. Rangel between this
2 district and the immigration detention center in Tacoma. The Court has held two
3 separate detention hearings over the course of five days with respect to Mr.
4 Rangel's detention pending trial. Likewise, Mr. Rangel's detention out of district
5 has imposed substantial barriers to his ability to effectively consult with his court
6 appointed counsel and present a defense to the charges he faces. Although
7 Tacoma is not substantially farther than other areas court-appointed attorneys are
8 expected to travel in this district, the fact remains that Mr. Rangel was detained
9 out of district. Detaining criminal defendants out of district has the potential to
10 disproportionately affect indigent defendants whose court-appointed attorneys do
11 not have the time or resources to undertake out-of-district travel on a regular basis.

12 **C. Dismissal of the indictment is the only remedy for the ongoing violation
of Mr. Rangel's right to pretrial release under the BRA.**

13 Because ICE cannot, or will not, work cooperatively with the USAO to
14 provide for Mr. Rangel's criminal prosecution in compliance with the BRA, the
15 Court must fashion an appropriate remedy. "Dismissal is appropriate when the
16 investigatory or prosecutorial process has violated a federal constitutional or
17 statutory right and no lesser remedial action is available." *United States v.*
18 *Barrera-Moreno*, 951 F.2d 1089, 1092 (9th Cir. 1991). In *United States v.*
19 *Hasting*, 461 U.S. 499 (1983), the United States Supreme Court recognized three
20 bases underlying a court's inherent supervisory powers: "(1) To implement a

1 remedy for a violation of recognized rights; (2) to preserve judicial integrity by
2 ensuring that a criminal conviction rests on appropriate considerations validly
3 before the jury; and (3) to deter future illegal conduct.” *United States v.*
4 *Gonsalves*, 781 F.2d 1319, 1320 (9th Cir. 1986) *abrogated on other grounds by*
5 *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (citing *Hasting*, 461
6 U.S. 499). In the past, the Ninth Circuit read *Hasting* as limiting the court’s
7 inherent powers to these “three specific areas.” *See W.R. Grace*, 526 F.3d at 509
8 n.9. However, the court has since changed course and now recognizes that nothing
9 in *Hasting* limits the court’s supervisory powers to the three mentioned areas. *Id.*

10 In its supplemental briefing, the USAO suggests that the Court could issue a
11 writ of habeas corpus ad prosequendum to secure custody of Mr. Rangel in the
12 days leading up to and throughout trial. ECF No. 57 at 4. While this proposed
13 remedy would ensure Mr. Rangel’s physical presence in the district—a substantial
14 improvement on conditions to date—it would not remedy the prejudice imposed
15 on Mr. Rangel by his pretrial detention. First, a writ would not solve the ongoing
16 violation of Mr. Rangel’s statutory right to pretrial release under the BRA. A writ
17 will transfer custody of Mr. Rangel from DHS to DOJ. However, this Court has
18 already ordered that Mr. Rangel be released on bond pending trial. DOJ cannot
19 detain Mr. Rangel pending trial and comply with the Court’s order directing
20 pretrial release.

1 Speedy trial considerations also preclude alternative remedies. Trial in this
2 matter is set for March 26, 2018. The Speedy Trial Act requires that the USAO try
3 Mr. Rangel on or before March 29, 2018. Thus, on the date of the detention
4 hearing, Mr. Rangel had only one business week to consult with his attorney and
5 prepare for trial. If the Court allowed the prosecution to proceed, Mr. Rangel
6 would be effectively forced to choose between his Sixth Amendment right to
7 consult with counsel to prepare an effective defense and his right to a speedy trial.

8 Likewise, the remedy imposed by other courts facing similar violations is
9 not viable in this case. In *United States v. Trujillo-Alvarez*, for example, the
10 district court provided the executive a period of time to elect whether to pursue
11 immigration proceedings or to proceed with the criminal prosecution. This remedy
12 is once again ineffective given the Speedy Trial Act deadlines in this case.

13 Because the Court finds no lesser remedy available, dismissal of the
14 indictment is appropriate under the Court's supervisory powers.

15 Accordingly, **IT IS HEREBY ORDERED:**

- 16 **1. USAO's Motion for Pretrial Detention, ECF No. 41, is DENIED.**
- 17 **2. The Indictment, ECF No. 1, is DISMISSED WITHOUT**
PREJUDICE.
- 19 **3. Defendant Efren Suarez Rangel is ordered RELEASED from**
custody.

1 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order
2 and provide copies to all counsel, Magistrate Judge Dimke, and the United States
3 Marshals Service.

4 || DATED this 21st day of March 2018.

Salvador Mendoza Jr.

SALVADOR MENDOZA, JR.
United States District Judge